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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. MICHAEL LAURENCE HARVEY, Petitioner.	2 CA-CR 2008-0218-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-68344

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
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E S P I N O S A, Judge.

¶1 Following a jury trial, Michael Harvey was convicted of unlawful imprisonment, disorderly conduct, and four counts of aggravated assault. The trial court sentenced him to a combination of presumptive and aggravated, concurrent and consecutive prison terms totaling 27.5 years. This court affirmed his convictions and sentences on appeal. *State v. Harvey*, No. 2 CA-CR 2001-0400 (memorandum decision filed Dec. 23, 2003). Harvey filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., alleging claims of newly discovered evidence, sentencing error, and numerous instances of ineffective assistance of counsel. The trial court summarily denied relief on the majority of claims Harvey raised in the petition, finding an evidentiary hearing was warranted on "the limited issues of trial strategy and notice specifically regarding [a witness's] statements, the decision whether or not to present [another witness], and the jury instructions regarding reckless endangerment and criminal negligence only."[1] The court denied relief following the evidentiary hearing. This petition for review followed. We will uphold the trial court's denial of post-conviction relief absent an abuse of discretion. *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). We grant review but deny relief.

¶2 Harvey raises numerous and overlapping issues on review, most of which concern the trial court's rulings on his claims of ineffective assistance of counsel. We address those first. A defendant is not entitled to relief from a conviction based on

[1]Harvey challenges on review the denial of relief on only two of those claims, which we discuss below.

ineffective assistance of counsel unless the defendant is able to establish that counsel's performance was both deficient, based on prevailing professional norms, and prejudicial, that is, the outcome of the case probably would have been different but for the deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Summary disposition of claims for post-conviction relief is appropriate when a defendant presents no "material issue of fact or law which would entitle the defendant to relief" and "no purpose would be served by any further proceedings." Ariz. R. Crim. P. 32.6(c).

¶3 Evidence was presented at trial that Harvey had forced a woman into his car at gunpoint in a parking lot of an adult entertainment business. He hit two police cars in an alleyway as he drove out of the parking lot and was hit by a third as he entered the roadway. He then drove toward two police officers who were standing in front of the business and hit both of them before getting out of his vehicle and attempting to flee on foot.

¶4 Harvey first argues trial counsel was ineffective in failing "to understand, prove or argue there was no bad driving (no flight) through the alley." He contends that, although "trial testimony and some initial police statements rebutt[ed] flight and/or reckless driving through the alley . . . [a]mazingly, trial counsel admitted there was bad driving through the back parking lot/alley instead of proving and arguing good driving." This, he contends, "precluded [Harvey] from rebutting flight, consciousness of guilt, and motive

evidence and allowed the jury to convict based on inaccuracies and falsehoods and an improper 'flight' instruction."

¶5 But Harvey has not specifically identified any favorable evidence that was not presented at trial. Nor has he described what inaccuracies or falsehoods were presented to the jury. Thus, he failed to present a colorable claim on these issues. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) ("A colorable claim is 'one that, if the allegations are true, might have changed the outcome.'"), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). Further, no additional evidence negating an inference of flight would have precluded the court's flight instruction. Even when conflicting evidence has been presented, "[a] party is entitled to an instruction on any theory of the case reasonably supported by the evidence." *State v. Shumway*, 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983). The state was entitled to an instruction on flight based on the evidence that was admitted.

¶6 Harvey also failed to establish counsel performed deficiently during closing argument. Counsel did not, in fact, concede Harvey drove recklessly in the parking lot or through the alley. Rather, he argued that "no testimony" showed "Harvey did anything reckless . . . with the exception of coming out [of the alley], going about 15 miles-an-hour." To the extent counsel's statement constituted a concession that Harvey's speed exiting the alley was reckless, that concession was strategically reasonable, given the evidence presented. "Actions which appear to be a choice of trial tactics will not support an allegation

of ineffective assistance of counsel." *State v. Espinosa-Gamez*, 139 Ariz. 415, 421, 678 P.2d 1379, 1385 (1984). Moreover, any concession counsel arguably made was not prejudicial. The trial court did not abuse its discretion in summarily denying relief on this claim.

¶7 Next, Harvey asserts "[i]f [he] is wrong, and his driving through the alley was unreasonable, it only amounted to negligence or criminal negligence." He contends that "criminal negligence . . . is a 'complete defense' to a reckless assault allegation" and that trial counsel was ineffective in failing to request an instruction on criminal negligence and argue Harvey's driving had been merely negligent or criminally negligent. But, negligence or criminal negligence is a "defense" to reckless assault only in that criminal negligence is a less culpable mental state than recklessness. *See* A.R.S. § 13-105(10)(c), (d). To prove the aggravated assault allegations, the state was required to show that Harvey had acted intentionally, knowingly, or recklessly. *See* §§ 13-1203, 13-1204.[2] Trial counsel did not fall below professional norms by failing to request an instruction on a mental state inapplicable to the charges at issue. Nor did counsel perform deficiently by failing to equate Harvey's mental state to negligence or criminal negligence in argument. Counsel's argument addressed the state's proof of the mental state applicable to the crimes with which Harvey was charged. The trial court did not abuse its discretion by denying relief on this claim following the evidentiary hearing.

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[2]Except where noted, we cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

¶8 Harvey next contends there was insufficient evidence to support his conviction for aggravated assault against Officer Faulk, the officer who had collided with him as he exited the alley. This claim is precluded because, although raisable, Harvey did not assert it on appeal. *See* Ariz. R. Crim. P. 32.2(a)(1), (3). We address it only in connection with his claim that appellate counsel's failure to raise it on appeal constituted ineffective assistance. Harvey appears to argue the state was required to prove he intentionally assaulted Faulk knowing or having reason to know Faulk was a peace officer. We disagree. The indictment alleged Harvey had assaulted Faulk in violation of § 13-1204(A)(2) and (C).[3] Subsection (A)(2) provides that a person commits aggravated assault by committing assault as defined in § 13-1203 with "a deadly weapon or dangerous instrument." Assault under § 13-1203(A)(1) requires proof that the defendant "[i]ntentionally, knowingly or recklessly caus[ed] any physical injury to another person." Section 13-1204(C) provides that aggravated assault under subsection (A)(2) is a class two felony if "committed on a peace officer while the officer is engaged in the execution of any official duties." The jury was correctly instructed according to these provisions, and appellate counsel did not perform deficiently by failing to argue otherwise on appeal.

¶9 Harvey labels his next argument "lack of notice, non-unanimous verdicts, and *Strickland* error." To the extent we understand the assertions he includes under this heading,

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[3]Harvey was not charged under § 13-1204(A)(8)(a), which requires proof the defendant committed an assault "knowing or having reason to know" the victim was a peace officer.

he appears to contend the indictments were insufficient and duplicitous because the state did not allege the specific manner in which Harvey had committed the alleged underlying assaults and that the state asserted "alternative acts" by arguing the evidence showed Harvey had acted either intentionally to place the victims in reasonable apprehension of imminent physical injury or had recklessly caused them injury. He concludes, therefore, that the jury's verdicts are at least potentially non-unanimous. These claims are also precluded because Harvey waived them below and failed to assert them on appeal. *See* Ariz. R. Crim. P. 32.2(a)(1), (3); *State v. Anderson*, 210 Ariz. 327, ¶ 17, 111 P.3d 369, 378 (2005) (pretrial objection to duplicitous indictment required). We address them only to the extent he also claims trial counsel's failure to object constituted ineffective assistance. But contrary to Harvey's contention, an allegation that the same act was done either recklessly or intentionally or that an act caused either reasonable apprehension of immediate harm or actual injury does not constitute an allegation of separate crimes or alternative acts. And no authority supports Harvey's contention that the jury had to agree on the manner in which he committed the aggravated assaults. "Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed." *State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982) (citation omitted); *see also Schad v. Arizona*, 501 U.S. 624, 629-30 (1991) (jury need not be unanimous as to whether first-degree

murder committed with premeditation or under felony murder theory). Thus, trial counsel did not perform deficiently by failing to raise these issues.

¶10 Next, Harvey asserts that "*Strickland* error occurred throughout [trial counsel's] representation." Specifically, he contends that counsel's "constant trial schedule adversely affected the quality of [his] practice" and that counsel's closing argument was "substandard."[4] Harvey apparently believes the trial court erred by denying his request for an evidentiary hearing on the issue of counsel's trial schedule. But Harvey has not identified below or in his petition for review any specific instance wherein counsel's case load allegedly interfered with his representation in this case. Rather, he has offered only unsupported assertions that counsel was "overwhelmed by a large caseload" and "generally unprepared, disorganized, highly stressed, [and] in turmoil." Regarding counsel's closing argument, Harvey lists several points he believes would have been persuasive but that counsel failed to make about the evidence presented. But he offers nothing to show the omissions constituted deficient performance or that counsel's failure to argue the points

[4]Harvey also contends in subsections (B) and (D) of this argument respectively that the trial court "never addressed trial counsel's broken promises to present defenses" and counsel committed "malpractice" by failing to object to the jury instructions concerning flight and recklessness. Subsection (B), however, contains no argument whatsoever; therefore, it presents nothing for us to address. To the extent Harvey intended to include argument that trial counsel was ineffective for mentioning expected evidence in his opening statement that was not presented at trial, we address that issue in paragraph thirteen below. Subsection (D) appears to include contentions we have already addressed in paragraphs five, seven, and eight above.

mentioned affected the outcome of the case. Thus, the trial court did not abuse its discretion by summarily dismissing this claim.

¶11 Harvey next argues that counsel "lost" a key defense witness and evidence of Harvey's post-traumatic stress disorder (PTSD). In his petition below, Harvey contended that involuntary drug intoxication and the effects of post-traumatic stress were key elements of his defense. He had disclosed a witness who ostensibly would admit to having "spiked" Harvey's drink with an hallucinogenic drug on the night of the incident and an expert witness who would testify Harvey suffered from PTSD. The drug witness did not appear at trial, and the trial court denied Harvey's motion to admit that witness's statements over the state's hearsay objection. On the fourth day of trial, the court granted the state's motion to preclude the expert testimony about Harvey's PTSD, finding it irrelevant.

¶12 As he did below, Harvey contends on review "[t]rial counsel committed *Strickland* error by failing to timely move for a continuance," take other steps to secure the drug witness's appearance, preserve the witness's testimony, or effectively argue the witness's statements were reliable and thus fell within an exception to the hearsay rule. But, as this court noted in the memorandum decision on appeal, trial counsel had moved for numerous continuances and attempted to secure the witness's appearance at trial, and nothing in the record indicates different action by counsel would have resulted in the witness's appearance. Indeed, the record suggests that, even had the witness appeared, he would have invoked his Fifth Amendment right not to testify. Morever, as explained in detail in this

court's memorandum decision on appeal, the trial court acted well within its discretion in determining the witness's statements were not trustworthy. *Harvey*, No. 2 CA-CR 2001-0400, ¶¶ 6-16. Thus, Harvey has not established he was prejudiced by the witness's "failure to appear or the court's preclusion of [the witness's] statement." *Id.* ¶ 26. Therefore, the trial court did not abuse its discretion in determining Harvey had failed to present a colorable claim of ineffective assistance of counsel in this regard.

¶13 Regarding the PTSD evidence, Harvey contends trial counsel was ineffective for failing to argue its relevance adequately, resulting in the court's preclusion of the evidence and counsel's opening statement regarding expected PTSD evidence becoming a "broken promise" to the jury. But there is nothing in the record establishing that any different or additional argument from counsel would have changed the trial court's evidentiary ruling. Indeed, the summary dismissal of this argument by the same judge who presided over the trial suggests otherwise. This court affirmed the trial court's evidentiary ruling on appeal, explaining that "evidence of a defendant's mental disorder short of insanity is inadmissible either as an affirmative defense or to negate the mens rea element of a crime." *Id.* ¶ 30; *see also State v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997). And Harvey has not clearly argued ineffective assistance of appellate counsel on this issue, but even assuming he adequately did so, he has failed to show he was prejudiced. Although trial counsel was unable to present evidence he had mentioned in opening statement, the jury was instructed to decide the case based on the evidence presented. We presume the jury followed

the court's instructions. *See State v. Morris*, 215 Ariz. 324, ¶ 55, 160 P.3d 203, 216 (2007) (appellate court presumes jurors follow trial court's instructions that lawyer's statements not evidence), *cert. denied*, ___ U.S. ___, 128 S. Ct. 887 (2008). Thus, the trial court did not abuse its discretion in denying relief on this claim.

¶14 Next, Harvey asserts several sentencing errors he claims render his sentence unconstitutional. Most of the alleged errors, however, were raisable on direct appeal, and his claims that rely on those errors are precluded. *See* Ariz. R. Crim P. 32.2(a)(1). Harvey does not expressly argue any of the exceptions to the rule of preclusion apply. *See* Ariz. R. Crim. P. 32.2(b). To the extent he attempts to assert a significant change in the law pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), the trial court correctly disagreed. As the trial court noted, once it found one *Blakely*-compliant or -exempt aggravating factor, it was entitled to find and consider additional aggravating factors. *See State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005). In this case, the court considered Harvey's prior convictions in aggravation. "Prior convictions are *Blakely*-exempt because the sentencing court may consider them even if a jury does not find them." *State v. Munninger*, 213 Ariz. 393, n.1, 142 P.3d 701, 703 n.1 (App. 2006), *citing Blakely*, 542 U.S. at 301. To the extent Harvey attempts to challenge for the first time in post-conviction proceedings the sufficiency of the evidence of his prior convictions and of the other aggravating factors found by the trial court, that claim could have been raised on appeal and is, therefore, precluded. *See* Ariz. R. Crim. P. 32.2(a)(1).

¶15 Next, Harvey argues the trial court abused its discretion by denying his claim of newly discovered evidence. His claim was based on a posttrial statement by a witness that Harvey asserts "undermines [the] testimony/credibility" of the victim of the unlawful imprisonment charge and one of the aggravated assault charges and "probably would change the verdict or sentence." He also claims trial counsel was ineffective for failing to adequately investigate this witness and obtain his statement before trial. Harvey fails to mention in his petition for review, however, that the witness actually gave two diametrically opposed statements: one in the form of an unsworn letter on which Harvey now relies and another in a transcribed interview with Rule 32 counsel. During the interview, the witness repeatedly stated the letter was false, he wrote it because he had been threatened, and he would not testify consistently with it. Also during the interview, the witness told a version of events that was substantially similar to the victim's trial testimony. Harvey's contention, therefore, that the potential testimony of this witness would have likely changed the outcome of trial is wholly without merit. The trial court did not abuse its discretion in denying relief on Harvey's claim of newly discovered evidence following the evidentiary hearing at which the witness refused to testify. Further, we remind counsel he has a duty of candor to this court equal to that owed the trial court regarding the witness's recantation of the basis of his claim. *See* ER 3.3, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42.

¶16 Finally, Harvey contends the trial court erred by "refus[ing] to address" some of his claims and denying his motions for findings of fact and conclusions of law. He claims

that any findings the court did make were "unreliable" because the court violated due process and Rule 15, Ariz. R. Crim. P., by denying his motions for post-conviction discovery. The court, however, adequately addressed Harvey's claims in its rulings, and it did not abuse its discretion in denying his discovery motions. Harvey's reliance on Rule 15 is completely misplaced. The rule addresses disclosure by the state and "applies only to the trial stage, not to [post-conviction relief] proceedings." *Canion v. Cole*, 210 Ariz. 598, ¶ 9, 115 P.3d 1261, 1262 (2005). Nor has he argued or demonstrated good cause for his discovery requests. *See id*. ¶ 10 ("trial judges have inherent authority to grant discovery request in [post-conviction relief] proceedings upon a showing of good cause").

¶17 For the foregoing reasons, although we grant Harvey's petition for review, we deny relief.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge